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No. 85-530

In the Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, ET AL., PETITIONERS

v.

MAGNO J. ORTEGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether state officials violated the Fourth Amendment by entering and searching the office of a state employee in connection with an administrative investigation of that employee's job performance and work-related conduct.

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INTEREST OF THE UNITED STATES

This case involves a state governmental agency's authority to enter and search an office assigned to one of its employees in order to inventory government property in connection with an administrative investigation into the employee's work-related performance and conduct. The court of appeals has held that a warrantless entry into such an office violates the Fourth Amendment and provides a basis for an award of damages under 42 U.S.C. 1983. Because the Court's decision here regarding the constitutionally permissible scope of a work-related intrusion into a government employee's workplace will also apply to the federal government in its capacity as employer, the United States has a strong interest in this case.

STATEMENT

1. Respondent was Chief of Professional Education at Napa State Mental Hospital (Napa), a public institution owned and operated by the State of California, and served as a psychiatrist at that institution for 17 years, from

1964-1981. In July 1981, respondent became the subject of an administrative investigation as a result of complaints of sexual harassment filed by two female Napa employees and certain questions raised about the management practices of his department, including the questionable acquisition of a computer (see Pet. App. A10-A13).[1] On or about July 31, 1981, respondent was informed by the Executive Director of Napa, petitioner O'Connor, that he was under administrative investigation; respondent was directed in writing to stay off the Napa premises and not to return without written approval. Respondent thereupon took two weeks vacation leave; upon the expiration of that leave on August 14, he was placed on administrative leave with pay pending completion of the investigation. Pet. App. A1-A2.

On August 17, 1981, petitioner O'Connor was informed by a hospital staff member that respondent had entered the Napa premises the previous weekend without permission and had taken home the computer, which was kept in

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[1] Specifically, respondent was charged with (i) making unwelcome sexual advances to a young female student assistant working under respondent's supervision and to a female social worker at Napa (Pet. App. A11); (ii) using his position to coerce money for the purchase of a computer from residents under his supervision by promising them that they would be given overtime work to cover their contributions when such overtime work in fact was not authorized (*id.* at A11-A12); (iii) placing a resident under his supervision on unpaid leave for a month for refusing to contribute to purchase of the computer (*id.* at A12); (iv) causing the Executive Director of Napa, petitioner O'Connor, to sign two subpurchase orders for additional computer parts by misrepresenting to him that the computer had been donated to the hospital (*id.* at A13); and (v) violating state rules and policies by arranging to have an outside consultant demonstrate the computer to the hospital residents without obtaining prior approval and by agreeing to pay amounts in excess of the authorized rates for these services (*ibid.*) These allegations were all determined adversely to respondent at the administrative hearing concerning his discharge (*id.* at A10-A14).

a room adjacent to his office. Petitioner O'Connor believed that the computer was state property, although in fact it was not. Pet. App. A2, A13; see note 1, *supra*. Subsequently, in furtherance of the administrative investigation and in light of the incident with the computer, petitioner O'Connor directed four Napa employees—including petitioner Friday—to enter respondent's office on the Napa premises " 'in order to separate the business files from any personal files in order to ascertain what was in his office' " (Resp. C.A. Br. 4 (quoting J.A. 50).[2] These employees made some effort to sort the items found in the office, but ultimately all the material, other than three items retained in connection with the investigation (see Pet. C.A. Br. 6), was placed in boxes and taken to a locked storage area where it was made available for respondent to collect. Pet. App. A2.

As a result of the investigation of the allegations of misconduct identified above, respondent was eventually terminated from his position at Napa as of September 22, 1981. The termination was upheld on appeal to the California State Personnel Board. Pet. App. A9-A15.

2. Respondent brought this action against petitioners—four Napa officials—in the United States District Court for the Northern District of California under 42 U.S.C. 1983 alleging, inter alia, that their actions violated his Fourth Amendment rights.[3] Respondent sought $250,000

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[2] Respondent's practice was to lock his office when he went home for the day, and he stated that he believed he had the only key to the office. This was not the case, of course, and the hospital personnel entered the office using another key. Pet. App. A2.

[3] Respondent also made pendent state law claims for invasion of privacy and breach of covenant of good faith and fair dealing. Pet. App. A3. The district court concluded that respondent's state law causes of action were barred by his failure to comply with the California Tort Claims Act, Cal. Gov't Code §§ 900, 905.2, 911.2, 911.4 (West 1980), and the court of appeals affirmed on that issue. Pet. App. A3, A7, A8.

in compensatory damages and $500,000 in punitive damages (J.A. 6). On cross-motions for summary judgment, the district court granted summary judgment for petitioners and dismissed the action without opinion. Pet. App. A8. In a brief statement from the bench, the court concluded that the entry into the office was justified by the "need to secure the office" and therefore that the search was "reasonable" (J.A. 23).

3. The court of appeals reversed (Pet. App. A1-A7). In the court of appeals' view, the Fourth Amendment issue turned on " 'whether the area was such that there was a reasonable expectation of freedom from government intrusion.' " Pet. App. A3 (quoting *Katz* v. *United States*, 389 U.S. 347, 352 (1967)). The court noted that respondent worked in an office containing personal and confidential information with a lock on the door and that it was his stated belief that the office had never been entered without his permission in 17 years. The court also noted that office inventories "were apparently reserved for employees who were departing or were terminated," whereas respondent merely had been placed on administrative leave and was not terminated until the following month. The court concluded that these facts demonstrated that respondent "had a subjective expectation of privacy in his office that society is prepared to recognize and protect as reasonable." Pet. App. A4.

The court of appeals distinguished other decisions finding no reasonable expectation of privacy in the workplace from work-related searches on the ground that "Napa had never instituted surveillance or searches and had no general inspection policy that might have defeated [respondent's] expectation of privacy in his office." Pet. App. A6. The court also considered it irrelevant that "[t]he search of [respondent's] desk was apparently motivated by concern with the whereabouts of a computer and by the impending investigation of [respondent]," rather than by a reason unrelated to respondent's work. *Id.* at A5 n.2. In

short, the court summarily concluded that "the search of [respondent's] office was not a reasonable search under the fourth amendment" (*id.* at A6) and remanded the case for entry of partial summary judgment in favor of respondent and for a hearing to determine the amount of damages (*id.* at A7).

SUMMARY OF ARGUMENT

A. The court of appeals' holding that a government employee has a reasonable expectation that his supervisor will not enter his office without permission does not accord with this Court's Fourth Amendment jurisprudence or the realities of the workplace. An employee is given office space for only one reason: to facilitate his work for his employer. Thus, while an employee may choose to keep personal items in his office, it is ordinarily understood that the office will be used primarily for work-related purposes and will house primarily items that relate to the job. The employer certainly does not relinquish access to his own property simply by assigning it as office space to an employee, and he will still have many legitimate reasons for requiring access. For example, employees working on cooperative projects often need to enter the offices of absent fellow employees to look for government property, such as a case file; supervisors may need to enter an office in the course of their duties to evaluate employee performance.

Thus, this Court has noted that an employee's expectation that his office will not be entered by outsiders does not extend to entries by his employer. *Mancusi* v. *DeForte,* 392 U.S. 364, 369 (1968). The court of appeals seriously erred in ignoring this distinction and instead treating respondent's office as a private enclave. The fact that the office was part of a state hospital and was furnished for the purpose of conducting state business is of crucial importance. Under these circumstances, even if

respondent had a subjective expectation that his office would not be entered by anyone without his consent, society would not recognize such an expectation as reasonable with respect to entries by representatives of his employer.

B. Assuming arguendo that a government employee has a legitimate expectation of privacy in his office that suffices to make the Fourth Amendment applicable to an intrusion by his employer, the court of appeals nonetheless erred in holding that the search of respondents' office was unconstitutional. The Fourth Amendment proscribes only unreasonable searches and, contrary to the court of appeals' apparent assumption, neither a warrant nor probable cause is a prerequisite to a finding of reasonableness. Given the employment situation presented here, these requirements for criminal investigative searches make little sense; the reasons for a supervisor's or co-employee's entry have nothing to do with probable cause and the magistrate would have no useful role to play. See generally *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985).

We submit that in this context it is reasonable under the Fourth Amendment for a supervisor to enter and search an employee's office if the entry is for a legitimate business purpose. While an employee's personal possessions, such as a briefcase or purse, are not subject to search simply because they may be brought to work, an employer retains the authority to search its own office space when necessary for the conduct of its business. In light of the extremely limited privacy interest at stake—an employee's interest in using his government furnished office to store personal items—a more exacting constitutional standard would unduly infringe the government's legitimate interest in effective management of the workplace. See *Connick* v. *Myers*, 461 U.S. 138 (1983).

This standard of reasonableness was surely satisfied here. Petitioners conducted a search of respondent's office, at a time when he was absent on indefinite admini-

strative leave, in order to locate state property in connection with an administrative investigation into his malfeasance on the job.

ARGUMENT

THE ENTRY AND SEARCH OF RESPONDENT'S OFFICE BY HIS EMPLOYER FOR BUSINESS-RELATED REASONS DID NOT VIOLATE THE FOURTH AMENDMENT

The court of appeals has created a regime of Fourth Amendment regulation of the workplace that is completely unsupportable. First, in considering whether respondent had an expectation of privacy in his office, the court ignored the undeniable fact that a government institution, like any other employer, provides an office for its employees in order to facilitate their work for the employer, not to give employees a private preserve in which to transact nongovernment business. Second, the court completely misapplied Fourth Amendment law in reasoning that respondent's expectation of privacy in his office necessarily meant that petitioners' warrantless entry amounted to a constitutional violation. A search violates the Fourth Amendment only if it is "unreasonable," yet the court made no attempt to assess the reasonableness of petitioners' conduct. The decision below, if taken at face value, suggests that Fourth Amendment violations occur whenever government employees enter a co-worker's office to look for a file or to borrow a pencil. This extreme view is not justified by this Court's Fourth Amendment jurisprudence and is not necessary to safeguard the privacy rights of government employees.[4]

[4] Whether or not the search in this case violated the Fourth Amendment, it cannot seriously be contended that petitioners' actions violated "clearly established" constitutional standards. Therefore, qualified immunity should protect petitioners against damages liability under Section 1983. See *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 7; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity issue apparently was not raised below and cer-

A. A Government Employee Has No Reasonable Expectation That A Supervisor Or Co-Employee Will Not Enter His Office In The Course Of Performing Employment-Related Duties

Since *Katz* v. *United States*, 389 U.S. 347 (1967), the Court has consistently taken the view that the Fourth Amendment applies only where an individual has a "justifiabl[e]" or "legitimate" "expectation of privacy" (*id.* at 353; *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979)). The inquiry whether an area is protected by the Fourth Amendment consists of two parts—"whether the individual by his conduct, has 'exhibited an actual (subjective) expectation of privacy' * * * [and] whether the individual's subjective expectation is 'one that society is prepared to recognize as "reasonable" '—whether * * * the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 353, 361); see also *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985); *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984); *United States* v. *Knotts*, 460 U.S. 276, 280-281 (1983). While the court of appeals paid lip service to this two-part inquiry, the court's analysis does not seriously attempt to address the objective component of the inquiry. In our view, the nature of the employment relationship and the purpose for which employees are allocated office space suggest that society would not deem it reasonable for an employee to expect his office to be completely free from unconsented entries by his employer or fellow workers. The decision below provides no basis for doubting the correctness of this view.

The court of appeals' finding that respondent had *some* expectation of privacy in his office is unremarkable on its face. In *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), this

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tainly was not addressed by the lower courts. In light of this Court's limited grant of certiorari, we will treat this case as involving solely an issue of substantive Fourth Amendment law.

Court recognized that an employee generally has a sufficient expectation of privacy in the office provided him by his private employer to give him "standing" to challenge a police search of that office. Here, respondent reasonably could have expected that personal possessions in his office would not be exposed to the view of outsiders having no connection with the hospital. That does not mean, however, that he legitimately could have expected that his office would remain free from entry by other workers at the hospital.

It surely cannot be doubted that the reason that an employer provides one of its employees with an office, even an office that is "private" in the sense that the employee does not share the workspace with another employee, is to facilitate the employee's performance of his work for that employer. While the employer recognizes that the employee may elect to keep some personal items in his office, it is plainly the understanding of all concerned that the office will be used primarily for work-related purposes. By the same token, the employer cannot be taken to have surrendered access to its own office space simply by assigning a particular office to an employee. Thus, in *Mancusi*, the Court recognized that the employee's expectation of privacy in his office was qualified by the employment relationship and by the fact that the office remained the property of the employer. The Court described Mancusi's expectation as one that the records in his office would not be taken or touched without "his permission *or that of his union superiors*" (392 U.S. at 369 (emphasis added)).

The court of appeals' decision fails to take cognizance of these elementary principles. Relying largely on respondent's assertions and subjective impressions, the court assumed that the hospital retained no cognizable interest in the office space that it assigned to respondent. The court apparently credited respondent's assertion that he believed that he possessed the only key to his office and

that no one had entered it without his permission in 17 years. The court also stated that no state records and files were located in respondent's office, apparently accepting respondent's declaration that the office contained no state property (other than furniture) but instead was used to store his personal possessions. See Pet. App. A2, A4 n.1; Ortega Declaration ¶ 5. The court viewed the office as respondent's private enclave—one that was untainted either by entry by any co-workers or by the presence of any materials relating to hospital business. Under the court of appeals' approach, therefore, the fact that the office was located in the state hospital is an irrelevant happenstance, and the case should be treated the same as if petitioners had searched an office owned or leased by respondent many miles from state property.

We find respondent's assertions concerning the private nature of his hospital office to be inherently incredible; the taxpayers of California ought to be entitled to assume that they are not providing office space and furniture solely for a state employee's private use.[5] Thus, we question whether respondent can be said even to have had a "subjective" expectation that his supervisors or fellow employees would not enter his office without his express permission. It is

[5] Respondent's assertions are belied to some extent by the limited record made in this case. Obviously, the hospital did have another key to respondent's office, which is what petitioners used to enter the office to conduct the inventory. It would be quite irresponsible for a state institution to give an employee its only key to state property, thereby requiring the state to break the lock or somehow force entry in the event that the employee lost the key or was unavailable. In addition, respondent's secretary declared that respondent left his door ajar during the work day and that he sometimes took the files relating to hospital residents into his office. Ciraulo Declaration 2.

At any rate, in the absence of any fact finding by the district court, the court of appeals plainly was not entitled to rely on these assertions to order the entry of judgment for respondent. At most, it should have vacated the entry of summary judgment for petitioners and ordered the district court to hold a trial to resolve disputed questions of fact.

not necessary for the Court to consider these factual matters, however, because, even if respondent did take unusual steps to give himself a greater subjective expectation of privacy in his office than most employees have, his expectation was not one that society ought to recognize as reasonable. The fact that the office searched here belonged to the State, was located on state property, and was provided to respondent for use in performing his duties as a state employee is not an irrelevant happenstance; rather, it is the critical aspect of this case. The realities of the workplace simply do not justify giving an employee the same constitutional protection in his government-furnished office—with respect to privacy from intrusions by his supervisor or co-workers—that he has in his home.

It cannot seriously be disputed that in the ordinary course of business many employment situations occasionally involve routine unconsented entries into an employee's office for work-related purposes. Cooperative projects often require one employee to enter another's office to borrow a book or to look at a case file. Moreover, apart from these everyday sorts of entries, there periodically will be situations in which a supervisor needs to enter an employee's office for a special reason. For example, when an employee is unexpectedly absent for a length of time, it may be necessary for a supervisor to retrieve documents or to inventory the contents of the employee's work area in order to maintain the efficiency of the office. (Here, for example, the entry occurred while respondent was on indefinite administrative leave.) Finally, a supervisor may need to enter an office as part of his responsibility to oversee employee performance, particularly when he has reason to suspect substandard performance or misconduct. Thus, because of the ordinary operation of the workplace and because of the employer's interest in effectively managing its business, an employee must be aware that from time to time the interior of his

office, including items left in the office, will be exposed to the view of his business associates. Accordingly, an entry by a supervisor into an employee's office is not an intrusion into an area in which there is a legitimate expectation of privacy, and hence does not implicate the protections of the Fourth Amendment.

The fact that the employer here is the State does not alter this conclusion, because the important interests in effective management noted above apply equally whether the employer is a private person or a government. This Court has long recognized the government's legitimate interest in "promot[ing] efficiency and integrity in the discharge of official duties, and * * * maintain[ing] proper discipline in the public service." *Ex parte Curtis*, 106 U.S. 371, 373 (1882). The Court has also noted, in the First Amendment context, that "government officials should enjoy wide latitude in managing their offices." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). See also *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.); *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896-898 (1961). Therefore, even assuming that government employees are entitled to special Fourth Amendment protection vis-a-vis their employers that their counterparts in the private sector lack (see *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 8-10), their status as government employees does not confer upon them a unique expectation of privacy that insulates them from intrusions that would otherwise be anticipated as a normal part of the employment relationship. In other words, the Fourth Amendment protection afforded government employees is triggered when a legitimate expectation of privacy is unreasonably infringed, but the Constitution does not operate to broaden that expectation of privacy. And the privacy considerations must be assessed in the particular context of the employment relationship,

because the government enjoys a freedom to act with respect to its own employees on internal government matters that it would not have with respect to the public in general. See *Connick*, 461 U.S. at 147.

Against this background, the court of appeals failed to explain why respondent had an objectively reasonable expectation to be free from unconsented entries by representatives of his employer. The court of appeals seems to have relied entirely on the fact that Napa had no well established policy that would have put respondent on notice that his office was subject to entry by a supervisor in the precise fact situation presented here. See Pet. App. A6.[6] But this factor cannot be dispositive of the question of a legitimate expectation of privacy. On the one hand, if there is a sufficient weighty privacy interest at stake, the government may not eliminate Fourth Amendment protection simply by announcing its intention to do so; for example, public notice that houses will be subject to warrantless searches would not eliminate the constitutional objection to such searches. On the other hand, if there is no legitimate privacy interest at stake, one is not created simply by the absence of an announced government policy of searches or even by an individual's unilateral assertion of a privacy interest. See *Oliver* v. *United States*, 466 U.S. 170 (1984).[7] Moreover, the rule proposed by the court of appeals is hardly calculated to contribute to the protection

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[6] The court of appeals' premise may well be incorrect. The court acknowledged petitioner's contention that it was "established hospital policy * * * to inventory property in the offices of departing or terminated employees to determine which property was state property and which was personal" (Pet. App. A3). The situation involving respondent, who was placed on leave because of a pending investigation that, as expected, led to his termination the following month, fell quite close to, if not within, this policy.

[7] We do not suggest that the existence of an established policy is completely irrelevant. On the contrary, if there were a published regulation here notifying state employees that their offices were sub-

of privacy in the workplace. It would encourage employers to search their employees' offices *more* frequently in order to establish a practice that would then justify a search in those situations in which a search was truly necessary. There is no reason why the Fourth Amendment ought to allow such indiscriminate searches and yet prohibit searches that are performed only in more focused and selective instances.

In sum, there is no basis for concluding that respondent had a legitimate expectation that his office would not be entered by his supervisor or fellow employees. The office remained government property, and respondent had no right to exclude other employees engaged in government business.[8] While a person may have an expectation of privacy from strangers to a particular area, he can hardly expect to maintain a similar privacy from persons—such as his employer's authorized representative—who have an equal or greater right of access to the area. See generally *United States* v. *Matlock*, 415 U.S. 164 (1974); see also

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ject to entry and search by their supervisors, respondent's claim of a subjective expectation of privacy would be frivolous. Indeed, such an established employment policy could justify a considerably more significant privacy intrusion than what occurred here; as long as the policy was reasonable, the employee could hardly complain about what he consented to as a condition of his employment. See *Chenkin* v. *Bellevue Hospital Center*, 479 F.Supp. 207 (S.D.N.Y. 1979) (state hospital anti-theft policy requiring employees to make parcels available for inspection upon exiting the hospital). But the absence of such an established policy does not itself confer an expectation of privacy where one does not otherwise exist.

[8] Respondent, like most employees, no doubt had a right to exclude *outsiders* from his office, but that right is one that is exercised derivatively on behalf of the employer; it would not justify excluding representatives of the employer. Even a right to exclude, of course, does not necessarily suffice to confer an expectation of privacy for Fourth Amendment purposes. See *Oliver* v. *United States, supra.*

Mancusi, 392 U.S. at 369-370; *United States* v. *Reeves*, 730 F.2d 1189, 1193-1194 (8th Cir. 1984); *United States* v. *Gargiso*, 456 F.2d 584, 586-587 (2d Cir. 1972). Accordingly, the court of appeals erred in holding that petitioners' entry into respondent's office violated a reasonable expectation of privacy.

B. A Supervisor Or Co-employee's Search Of An Employee's Office Is Reasonable If It Is Undertaken For A Legitimate Employment-Related Purpose

Even if an employee is held to have a reasonable expectation that his superiors or fellow workers will not generally enter his office without permission, the court of appeals' decision is still unsupportable.[9] The court of appeals *concluded* its analysis with its finding that respondent had a legitimate expectation of privacy, but such a finding is only the beginning of the inquiry. The Fourth Amendment prohibits only *unreasonable* searches and seizures, and "what is reasonable depends on the context within which a search takes place." *New Jersey* v. *T.L.O.*, slip op. 10.

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[9] The court of appeals did not distinguish between the entry into the office here and the further search that took place, but it appears undisputed that petitioners looked through respondent's desk and filing cabinet in an attempt to identify materials belonging to the State. While we maintain that it is clearly unreasonable for an employee to expect his office to be free from entries by supervisors and fellow employees in the normal course of business, we acknowledge that there are areas within an office, such as the interior of a desk, that present a closer question with respect to the existence of a legitimate expectation of privacy. Cf. *Mancusi* v. *DeForte*, 392 U.S. at 377 (White, J., dissenting). It is unnecessary to decide in this case whether respondent may have had a reasonable expectation of privacy in parts of his office, because, as we explain below (see pages 16-22, *infra*), petitioners' intrusion was reasonable within the meaning of the Fourth Amendment.

The court of appeals did not explain why the entry here was unreasonable, but it cannot seriously have meant to hold that petitioners could not constitutionally have entered respondent's office under *any* circumstances. Rather, it seems to have assumed that any intrusion into a legitimate expectation of privacy (or at least an intrusion that is in part investigatory (see Pet. App. A6)) is automatically unreasonable in the absence of a warrant based on probable cause.[10] There is no justification, however, for importing these requirements, which are generally applicable when an individual is singled out on the basis of suspicion of criminal activity, into the employment context. The concepts of a search warrant and criminal probable cause have no application to the sort of "searches" involved here, which were simply part of the ordinary employee/employer relationship and were not designed to ferret out evidence of criminal activity. "The standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures." *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976).

By the same token, it makes no sense to require government supervisors to obtain an "administrative warrant" to enter their subordinates' offices. These entries are not based on administrative probable cause either; they are not justified as part of a neutral administrative plan in furtherance of regulatory requirements (see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978)). Interposition of the judgment of a neutral magistrate would serve no purpose. It is simply not "reasonable," either in common sense or Fourth Amendment terms, to expect a fellow employee to apply to a magistrate for a warrant every time he needs to enter an employee's office to look for a

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[10] Respondent's brief in the court of appeals also did not discuss why the search was unreasonable, but, on those few occasions that the brief did advert to the issue (at 7, 17, 18), it complained about the absence of a search warrant.

case file or to inventory government property or to obtain information to assist in an investigation of the employee's performance. See generally *New Jersey* v. *T.L.O.*, slip op. 13-14.[11] The contrary rule adopted by the court of appeals runs afoul—in extreme fashion—of "the common-sense realization that government offices could not function if every employment decision became a constitutional matter" (*Connick* v. *Myers*, 461 U.S. at 143 (footnote omitted)).

The view that petitioners' actions here could have invaded a legitimate expectation of privacy, thereby invoking the protections of the Fourth Amendment, yet still be constitutional in the absence of a warrant and probable cause is fully consistent with established precedent of this Court. It has long been recognized that even in the criminal investigation context, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion" or a warrant. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976); see also *Terry* v. *Ohio*, 392 U.S. 1 (1968). And just last Term, the Court emphasized that these requirements did not apply in the special setting of a school, even where the case involved the discovery of illegal drugs in a student's purse. *New Jersey* v. *T.L.O.*, slip op. 10-16. The relationship between employer and employee, like that between school authorities and students, is quite distinct from that between law enforcement officers and criminal suspects.[12]

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[11] Indeed, the implicit premise of the court of appeals' decision is quite dubious; it is not apparent that a magistrate would even have the authority to issue such a warrant, which would not entail an assessment of probable cause or any other standard that could reasonably be said to be within the magistrate's ken. See Fed. R. Crim. P. 41.

[12] If there is an analogy in the criminal area to the sort of Fourth Amendment claim brought by respondent here, it lies in the "inventory search" cases. The Court has recognized that incident to booking and jailing a criminal suspect, the police may search his possessions, including personal items such as a pocketbook, for inventory pur-

"[T]he overarching principle * * * embodied in the Fourth Amendment" is one of " 'reasonableness.' " *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). That "reasonableness" determination is made by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U.S. 696, 703 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). We submit that the "reasonableness" test of the Fourth Amendment is satisfied in this context if the employer's search of an employee's office is reasonably related to the performance of his duties, *i.e.*, if it is pursuant to a legitimate business purpose. These justifiable purposes should not be restricted to innocuous entries intended to facilitate particular projects, but should also extend to entries to inventory or search for government property and entries to assist in evaluating an employee's performance, even if he is suspected of misconduct.

This standard takes account of the strong governmental interest in effective management of the workplace (see pages 11-13, *supra*), while still according some degree of protection to an employee's quite limited interest in using his government-furnished office for the storage of personal items that he would prefer not to have exposed to his fellow employees. Moreover, the standard sensibly equates the special Fourth Amendment protection that is accorded to an employee because of the happenstance that he works for the government with the ordinary expectation of privacy (albeit not of constitutional dimension) that an employee would have in the private sector.

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poses, without probable cause or a warrant. *Illinois* v. *Lafayette*, 462 U.S. 640 (1983); *South Dakota* v. *Opperman*, *supra*. An inventory search is not based on a reason to suspect that evidence will be found, but rather it is justified on the basis of a range of government interests relating to the efficient operation of the police station. See *Lafayette*, 462 U.S. at 646-647.

The lower courts have consistently applied this kind of approach in assessing the validity of workplace searches. The first case to address the question was *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951). In *Blok*, the court held invalid a warrantless police search of the desk of a government employee who was suspected of petty larceny. Anticipating *Mancusi*, the court held that the employee's exclusive right to use the desk gave her standing to challenge the search, which it found to be unreasonable. The court added, however, that "[n]o doubt a search of [the desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use." *Id.* at 1021.[13]

Similarly, in *United States* v. *Bunkers*, 521 F.2d 1217, 1220 (9th Cir.), cert. denied, 423 U.S. 989 (1975), the court stated that a postal employee could not seriously maintain a reasonable expectation of privacy from a search by postal inspectors of her government-supplied locker for fruits of a work-connected crime, *viz.*, stealing postal parcels. The court upheld the warrantless search, though it reserved the question whether a different result would be in order if the search were "not work connected." 521 F.2d at 1220 n.1; see also *United States* v. *Sanders*, 568 F.2d 1175 (5th Cir. 1978). And in *United States* v. *Collins*, 349 F.2d 863, 867-868 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966), the court stated that it had "no doubt that the search of defendant's work area, including the surface and interior of his deck, conducted by [a Customs agent] was a constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the per-

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[13] The issue presented in *Blok* concerning whether a law enforcement officer could search the desk of a government employee for evidence of a non-work-related crime pursuant to consent of a supervisor is not presented here, and we express no view as to how it should be resolved.

formance of his duties as a Customs employee." See also *Williams* v. *Collins*, 728 F.2d 721, 728 (5th Cir. 1984) ("It is by no means certain that Williams had a reasonable expectation of privacy in his government-furnished desk, in relation to the possibility of his supervisors entering the desk as part of an investigation of Williams' job performance or as part of an office inventory."); *United States* v. *Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) ("element of work-relatedness" is basis for assessing validity of supervisor's search).[14] Thus, whether cast in terms of a lack of expectation of privacy or reasonableness, the courts have consistently recognized that an area furnished to a government employee for use in performing his duties is not protected from a work-related search by a superior, including searches occasioned by concern about the employee's misconduct.

This line of authority plainly comports with the Fourth Amendment, and application of the principles it reflects makes clear that petitioners' actions were constitutional. Indeed, this case is considerably easier than many of the cases cited above, which involved searches of areas (such as lockers) set aside primarily for storage of personal items or searches designed to confirm suspicions of criminal (albeit work-related) activity. Here, the search was conducted primarily for inventory purposes, *i.e.*, to identify

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[14] *Gillard* v. *Schmidt*, 579 F.2d 825 (3d Cir. 1978), on which the court of appeals primarily relied, is fully in accord with these decisions. In that case a member of the Board of Education was upset by an unflattering cartoon that appeared in a newspaper. Acting on a tip, he searched the desk of a school guidance counselor in an effort to determine the identity of the cartoonist. The court of appeals held that the search violated the Fourth Amendment. The court specifically noted, however, that it had no occasion to consider the line of authority upholding searches for work-related reasons because there was no claim that the board member was acting to recover government property or to monitor the guidance counselor's performance of his official duties. 579 F.2d at 829 n.1.

state records in connection with a pending administrative investigation of respondent (which was directed at his malfeasance in office, not at uncovering criminal activity). And it was performed at a time when respondent was absent from work indefinitely on involuntary administrative leave. An inventory search may be performed at a police station without any suspicion of uncovering evidence of a crime, so long as there is reasonable justification for the inventory (see *Illinois* v. *Lafayette*, 462 U.S. 640 (1983)). It would seem to follow *a fortiori* that an office inventory may be performed in furtherance of a supervisor's duties. Unlike the stationhouse inventory, which may involve the most personal of possessions, the inventory in the work setting is limited to property that belongs to the government and from which the employee has no right to exclude his employer.

We emphasize that this would be a different case if petitioners had searched a private item found in the office, such as a briefcase or a purse or a file of papers whose cover clearly showed it to be non-work-related.[15] Employees have a far stronger expectation of privacy in such personal effects (see, *e.g.*, *Arkansas* v. *Sanders*, 442 U.S. 753, 762 (1979)), and the government's need to search for business-related reasons is substantially less compelling. A supervisor would not be entitled to search an employee's briefcase if the employee were holding it while

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[15] *New Jersey* v. *T.L.O.*, *supra*, was such a case. There, a school official searched a student's pocketbook, an item infused with a strong degree of privacy. Thus, the fact that the Court applied a reasonable suspicion standard in *T.L.O.* (while noting that it did not preclude the possibility that a lesser standard would suffice (slip op. 15 & n.8)) does not suggest that such a standard would be appropriate here. Indeed, the Court in *T.L.O.* expressly reserved the question whether a student had any expectation of privacy in school-provided storage areas such as desks or lockers (slip op. 11 n.5).

standing on a street corner, and the briefcase does not lose all protection simply because it happens to be in a government office at a particular time.[16] But a government office or a government-furnished desk or file cabinet is different; an employee cannot reasonably expect to have a right to deny his supervisor or co-employee access to such government property.

In sum, the court of appeals manifestly erred in finding a Fourth Amendment violation here. This case does not involve a search by law enforcement agents for the purpose of investigating criminal activity or compliance with regulatory requirements. It does not involve a search by a supervisor for reasons unrelated to a legitimate business purpose. It does not involve an intrusion into a private possession of an employee, such as a briefcase, or an area specifically set aside for storage of personal items. Rather, it involves an entry into an employee's workspace furnished to him by the State to facilitate his work for the State. The search was conducted at the direction of respondent's supervisor for the legitimate purpose of accounting for state property in the office, while respondent was suspended pending an administrative investigation that would shortly lead to his termination. Moreover, the entry was triggered in part by the revelation that respondent had violated the terms of his suspension by entering his office and removing what was reasonably thought to be state property. The court of appeals' view that, in these circumstances, the Fourth Amendment prohibited the entry into respondent's office cannot be countenanced.

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[16] *United States* v. *Speights*, 557 F.2d 362 (3d Cir. 1977), appears to reflect this distinction. There the court invalidated an employer search of a locker issued to police officers for storage of their personal belongings, relying heavily on the fact that the employees had been permitted to use private locks that could not be opened by the employer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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